Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1999

MARY and LESTER FURLOW,

Petitioners,

v.

ALLIED CONVEYOR, Inc., and

DURR INDUSTRIES, Ltd.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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28pp

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued December 11, 1998

Before

Hon. William J. Bauer,

Circuit Judge

Hon. Frank H. Easterbrook,

Circuit Judge

Hon. Daniel A. Banion,

Circuit Judge

Mary E. Furlow	)	Appeal from
and Lester Furlow,	)	The United
Plaintiffs-	)	States
Appellants	)	District
No. 98-1539	)	Court for the
V.	)	Southern District
Allied Conveyor,	)	of Illinois
Defendants-	)	No. 92-CV-207- WDS
Appellees	)	

Order

A jury in this tort case under the diversity jurisdiction returned a verdict nominally in favor of the plaintiffs against Allied Conveyor, Inc., and Durr Industries, Inc., but added that each of these defendants bore "0 %" of the responsibility for the accident. The jury concluded that plaintiff Mary Furlow bore 40 % of the fault and that Nascote Industries, her employer, bore 60% of the fault. No one asked the judge to direct the jury to continue deliberating to resolve the apparent inconsistency.

On post judgment motions, the district judge concluded that the jury had found Allied and Durr liable only for the purpose of making Nascote pay (it had been named a defendant in third party actions by Allied and Durr). But Nascote could not be directly liable to the plaintiffs, given

the exclusive remedy feature of the workers compensation laws. So the district judge concluded that the "0%" finding took priority over the general verdict under Fed. R. Civ. P. 49 (b), and entered judgment for Allied and Durr. That conclusion is sound, so for substantially the reasons given in the district court's opinion of August 6, 1997, the judgment is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MARY E. FURLOW) CAUSE No. 92-and
LESTER FURLOW) CV-207-WDS
and LESTER FURLOW)
Plaintiffs,)
V.)
ALLIED CONVEYOR,)
INC. and DURR)
INDUSTRIES, INC.,)
Third Party)
Plaintiffs,)
V.)
NASCOTE INDUSTRIES)
Third Party Defenant.

ORDER NUNC PRO TUNC

STIEHL, District Judge:

The Court hereby amends its Order of August 6, 1997, nunc pro tunc, to provide that Page 3, line 12 shall read as

follows:

(d) Nascote Industries Inc., 60%

This conforms the language of the Court's Order to the language of Verdict Form D.

IT IS SO ORDERED.

DATED: *5 February 1998*

William D. Stiehl

District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MARY E. FURLOW) CAUSE No. 92- CV-207-WDS

and LESTER FURLOW)

Plaintiffs,)

V.)

ALLIED CONVEYOR,)

INC. and DURR)

INDUSTRIES, INC.,)

Third Party)

Plaintiffs,)

V.)

NASCOTE INDUSTRIES)

Third Party Defenant.)

MEMORANDUM AND ORDER

STIEHL, District Judge:

This matter is before the Court on plaintiffs' motion to modify the order of

judgment entered August 6, 1997. Plaintiffs assert that the Court erred in entering judgment in favor of defendants and against plaintiffs.

Plaintiffs' motion is two-fold. First, plaintiffs assert for the first time, that defendants waived their objections under Fed.R.Civ. Pro. 49(b) to the inconsistent verdicts when they failed to ask the Court to return the jury for further deliberation at the time the verdict was returned. The second is that the Court erred by not ordering a new trial.

1. Waiver under Rule 49 (b).

Plaintiffs now assert that the defendants waived their rights to contest the verdict under Rule 49(b) when they failed to request that the Court resubmit the verdict to the jury and, therefore, the Court erred when it entered judgment.

Initially, the Court notes that neither plaintiffs nor defendants sought further deliberations on the day the verdicts were returned. Additionally, plaintiffs did not argue the issue of waiver in their post trial pleadings.

The Court stated in its August 6, 1997 Order "(W)hen the verdict was returned, the parties did not
seek to have the jury continue its deliberations, but rather moved for entry of judgment." The Court declined the invitation to enter judgment at that time, and sought legal memoranda from the parties on the issue of the inconsistent verdict. Judgment was, however, entered on the separate verdict in favor of defendant Ford Motor Company. Although the jury had been excused, no judgment had yet been entered on the verdict in question, and the Court

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retained the ability to recall the jury for further deliberation. *See, e.g. Los Angeles Nut House v. Holiday Hardware Corp.* 825 F. 2d 1351, 1356 (9th Cir. 1987).

Plaintiffs assert, however, that defendants waived their rights under Rule 49 (b), relying on the holding in *Cundiff v. Washburn, 393 F. 2d 505 (7th Cir. 1968),* and its progeny. This line of cases has held that there can be a waiver of objection under Rule 49 (b) by either party. This situation arises when the answers to interrogatories are inconsistent with each other and one or more is inconsistent with the general verdict, and the parties did not request that the case be resubmitted to the jury to resolve the inconsistencies.

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The Court applied the first sentence of the quoted section of Rule 49 (b). Plaintiffs seek to have the sentence control this issue. The relevant portion of Rule 49(b) is:

When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial. Plaintiffs assert

that the Court must either return the case for further deliberations or order a new trial.

As the Court found in its August 6, 1997 Memorandunm and Order, the special interrogatory parts of Verdict Form D were consistent with each other, and only inconsistent with the general verdict of liability against defendants Durr and Allied. The Court found that the jury clearly wanted to find only the third party defendant Nascoste liable, and could do so only through Verdict Form D. This was the only verdict form involving Nascote, but getting to Nascote's liability first required a finding of liability against the defendants. This means, therefore, that the first quoted sentence of Rule 49(b) above, applies to this situation, giving the Court the option of entering judgment.

Durr and Allied each sought to have the jury returned for further deliberation in their post-trial memoranda, but the Court declined to do so due to the lapse of time. The Court was not required to send the case back to the jury, because the only inconsistencies were between the general finding of liability and the specific findings that Durr and Allied were 0% liable, plaintiff was 40% liable, and Nascote was 605 liable. Therefore, that part of Rule 49(b) which permits the Court to resolve the verdicts applied. The Court finds that plaintiffs' argument is without merit and that defendants did not waive any objections under Rule 49(b).

2. judgment under Rule 49(b).

In its Memorandum and Order, the Court determined that the verdict form constituted both general and special

interrogatories. Plaintiffs conceded as much in their memorandum which accompanied their motion for entry of judgment. Plaintiffs now assert that the Court improperly reweighed the evidence in its ruling and entry of judgment. However, under Rule 49(b), the Court "must take the view of the case that reconciles the interrogatories with the general verdict." *Turyna v. Martam Construction Co.* 85 F. 3d 178, 181, (7th Cir. 1996). The Court's Order of August 6, 1997, did precisely that. Reviewing the verdicts and the evidence the Court was then, and remains, convinced that the jury intended to assess liability only against Nascote.

Therefore, the court finds that it did not err in declining to order a new trial, and further finds that plaintiffs have offered no new grounds for the Court to

order a new trial in this case. The Court's judgment, therefore, shall remain, and plaintiffs' motion for modification of judgment is DENIED.

IT IS SO ORDERED.

DATED: 5 February 1998

William D. Stiehl

District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MARY E. FURLOW) CAUSE No. 92- CV-207-WDS

and LESTER FURLOW)

Plaintiffs,)

V.)

ALLIED CONVEYOR,)

INC. and DURR)

INDUSTRIES, INC.,)

Third Party)

Plaintiffs,)

V.)

NASCOTE INDUSTRIES)

Third Party Defenant.)

VERDICT FORM D

We, the jury, find for the plaintiffs and against the following defendant or defendants:

Allied Conveyor, Inc. YES X NO ___

Durr Industries Inc. YES_X_ NO___

We further find the following:

First: Without taking into consideration the question of eduction of damages due to the fault of Mary Furlow, if any, we find that the total amount of damages suffered by plaintiffs as a proximate result of the occurrence in question is $1,750,000.00

Second: As to the contribution claims against third party defendant, Nascote Industries, Inc., we find as follows:

For Allied Conveyor, Inc. and against Nascote Industries, Inc. YES_X_ NO___

For Durr Industries, Inc. and against Nascote Industries, Inc. YES_X_ NO____

Third: Assuming that 100% represents the total combined fault of all persons or entities whose fault proximately caused plaintiffs injuries, including Mary Furlow

any defendant you have found liable and any third party defendant you find liable, we find the per centage of such fault attributable to each as follows:

(a) Mary Furlow	40%
(b) Allied Conveyor, Inc.	0%
(c) Durr Industries, Inc.	0%
(d) Nascote Industries Inc.	60%
TOTAL	100%

(Instructions to jury: If you find any defendant not liable to the plaintiff, or that any third party defendant or non party was not at fault in a way that proximately caused plaintiff's injury, or if you find that the plaintiff was not contributorily at fault, then you should enter a zero (0) as to that person or persons.)

Fourth: After reducing the plaintiffs' total damages by the per centage of fault,

if any, of Mary Furlow, we assess plaintiffs' recoverable damages in the sum of $ 1,050,000.00 .

William L. Mullins FOREPERSON	Emma M. Kimball
Sharon A. Koenig	James T. Marks
Dena L. Rowley	Nita M. Nyle
Illegible on copy	Sara McCoy

JURY NOTE (record p. 323)

Just before the verdicts were returned, the jury sent the following note to the Court:

Judge Stiehl:

We are finding Mary Furlow 40% Responsible (sic) and finding Durr and Allied against Nascote. I would like to be sure we have the Form D Filled (sic) out correctly.

s/William L. Mullins

The Court replied as follows:

June 2, 1997

Ladies and Gentlemen:

I am sorry but I cannot respond to your request. Please review the applicable instructions and apply them to your understanding of the Verdict Form D, and then complete the Verdict Form D accordingly.

s/William D. Stiehl
Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued December 11, 1998

Before

Hon. William J. Bauer,

Circuit Judge

Hon. Frank H. Easterbrook,

Circuit Judge

Hon. Daniel A. Banion,

Circuit Judge

Mary E. Furlow	)	Appeal from
and Lester Furlow,	)	The United
Plaintiffs-	)	States
Appellants	)	District
No. 98-1539	)	Court for the
V.	)	Southern District
Allied Conveyor,	)	of Illinois
Defendants-	)	No. 92-CV-207- WDS
Appellees	)	

ORDER

Plaintiffs' -Appellants filed a petition for rehearing and suggestion of rehearing en banc on December 24, 1998. No Judge in regular active service has requested a vote on the suggestion of rehearing en banc, * and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Judge Rovner took no part in this decision.

Defendant Allied Instruction No. 18 I.PI. No. B45.03 Given as Modified

As to the plaintiffs' claims against the defendants, Allied Conveyor, Inc. and Durr Industries, Inc., an the third party claims of Allied and Durr against the third party defendant, Nascote Industries, Inc. when you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdicts must be unanimous.

Forms of verdict are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate forms and return them to into court. Your verdicts must be signed by each of you. You should not write or mark upon this or any of the other instructions given

to you by the court.

If you find for the plaintiffs and against either or both Allied Conveyor, Inc., and/or Durr Industries, Inc., and if you further find that Mary Furlow was not contributorily negligent, then you should use Verdict Form D, writing in "0%" on Line "(a)" of Paragraph "Third" of Verdict Form D.

If you find for plaintiffs and against either or both Allied Conveyor, Inc., and/or Durr Industries, Inc., and if you further find that plaintiff's injuries were proximately caused by a combination of the fault of that defendant or those defendants and Mary Furlow's contributory fault, and that Mary Furlow's contributory fault was 50% or less of the total proximate cause of plaintiff's injuries, then you should use Verdict Form D, writing in the per centage

of Mary Furlow's contributory fault on Line "(a)" of Paragraph "Third" of Verdict Form D.

If you find in favor of the defendants, Allied Conveyor, Inc., and/or Durr Industries, Inc., or that Mary Furlow's contributory fault was more than 50% of the total proximate cause of plaintiffs' injuries for which recovery is sought, then you should use Verdict Forms E and/or F.

If you find for plaintiffs and against either or both Allied Conveyor, Inc., and/or Durr Industries, Inc., and that Mary Furlow's contributory fault was 50% or less of the total fault, then you must also return a verdict as to the third-party claims of Allied Conveyor, Inc., and Durr Industries, Inc., against Nascote Industries, Inc.

As to the third party claims against

Nascote Industries, Inc. if you find in favor of either or both Allied Conveyor, Inc., and/or Durr Industries, Inc., and against Nascote Industries, Inc., then you should use Verdict Form D, writing in the percentage of fault of Nascote Industries, inc., on Line "(d)" of Paragraph "Third" of Verdict Form D.

If you find in favor of Nascote Industries, Inc., and against Allied Conveyor, Inc., and/or Durr Industries, Inc., then you should use Verdict Form G.

Defendant Durr's Instruction No. 1

I.P.I. 12.04 Modified for Product Liability

Given

More than one person or company may be to blame for causing an injury. If you decide that one or more defendant(s) were at fault and that such fault was a proximate cause of injury to the plaintiff, it is not a defense that some third person(s) or company who is not a party to the suit may also have been to blame.

However, if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person or company other than the defendants, then your verdict should be for the defendant(s).